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In the Supreme Court of the United States

OCTOBER TERM 1968

No. 699

ROBERT S. DALY,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Santa Clara

Brief for Respondent in Opposition

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OPINIONS BELOW

The recital in the Petition concerning opinions rendered by the lower courts is considered accurate and complete.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Six federal constitutional questions are advanced by petitioner. We believe that only two such questions exist in this case. The others he asserts are unsubstantial and fail

to rise to the level of federal constitutional questions or are foreclosed by the decisions of this Court.[1]

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1. Petitioner's third claim of constitutional error is that the trial court's jury instructions defining the words "shameful" and "morbid" (which are found in California's statutory definition of "prurient interest," Calif. Pen. Code § 311) were overbroad and vague. He suggests, "It would punish and suppress the sale and distribution of books upon the finding of a judge or jury that the *effect* of the book upon the average reader would be 'outrageous' or 'scandalous' or 'unwholesome.'" Pet. at p. 30. [Emphasis added.] The suggestion is without merit. The trial court instructed the jury that the words "shameful" and "morbid" were not defined in the statute. He then gave dictionary definitions as follows: "Shameful: Dishonorable, disreputable, ignominious, infamous, outrageous, scandalous, degrading. Morbid: Sick, unwholesome, unhealthy." (Settled Statement on Appeal, p. 6). Thus, the court's instructions contained nothing which intimated that the jury was to consider "effect." These supplemental instructions, given at the jury's request during deliberations, were merely a refinement of the definition of "prurient interest," to which books must "appeal" if they are to be found obscene.

Petitioner's fourth assignment of constitutional error is likewise wholly lacking in substance. It is contended that the trial court's instruction to the jury that appeal to prurient interest may be satisfied if they determine beyond a reasonable doubt that the material "appeals to the prurient interest of a clearly defined deviant sexual group" was constitutionally impermissible because the appeal must be to the "average person." This Court has clearly held to the contrary in *Mishkin v. New York*, 383 U.S. 502, 507-510 (1966).

Petitioner's fifth alleged constitutional question is that the trial court's instruction on the issue of "pandering was a denial of due process. Yet, the instructions were plainly in accordance with this Court's decision in *Ginzberg v. United States*, 383 U.S. 463 (1966). Thus, no federal constitutional issue is present, regardless of whatever state law questions there might be. *Cf.*, *People v. Noroff*, 67 Cal.2d 791; 63 Cal.Rptr. 575; 433 P.2d 479 (1967); *People v. Rosakos*, 268 A.C.A. 534, 74 Cal.Rptr. 34 (1968).

Finally, petitioner asserts constitutional error in the alleged failure of the prosecution to prove appeal to the prurient interest of a "normal person," failure to prove that the books exceeded contemporary community standards and that they lacked redeeming social importance. While such questions may be raised under state law *see*, *In re Giannini and Iser*, 69 A.C. 588, 72 Cal.Rptr. 655, 446 P.2d 535 (1968); *People v. Rosakos, supra*, 268 A.C.A. 534, 74 Cal.Rptr. 34 (1968), no federal issue is presented by these claims. *Phelper v. Decker*, 401 F.2d 232, 238-39 (5th Cir. 1968). Further, with respect to the question of appeal to the "normal person," this Court's decision in *Mishkin, supra*, is dispositive.

The two issues fairly presented by the record are:

(1) Whether each of the books bearing the titles "Blood Orgy," "His Brother Love," "Pay the Devil," "The Flesh Worshipers," "Never on Sin Day," "Gay Reunion," and "That Kind of Girl," is obscene and thus beyond the freedom of expression protections provided by the First and Fourteenth Amendments.

(2) Whether the trial jury was given a constitutionally proper definition under which it was to judge "scienter," and whether petitioner's convictions of the offense of distributing obscene matter rest upon constitutionally sufficient proof of "scienter."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution and the California Penal Code are set forth in Appendix D to the Petition.

STATEMENT OF THE CASE

On April 20, 1966, a complaint was filed in the Municipal Court for the San Jose-Milpitas-Alviso Judicial District, Santa Clara County, California, in which petitioner was charged with sixteen counts of a violation of California Penal Code section 311.2, distribution of obscene matter.[2] Pleas of not guilty were entered (Minutes of Proceedings in the Municipal Court, p. 2, hereinafter referred to as "Minutes"). Following lengthy pretrial proceedings both

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2. At this time we are unable to meet fully the requirements of Rule 40, 1(e), Revised Supreme Court Rules, regarding references to the record. We have examined the original files of the lower courts and found that the records contained therein were not paginated. Apparently, the single copy of the record certified to the Court under Rule 12 is the only one which is paginated. Counsel for petitioner informed us that he did not have a copy of the paginated record which we might borrow. We will, however, refer to specific documents and exhibits found in the certified record which can be readily identified and located.

before the trial court and courts of higher jurisdiction, the case came to trial on March 20, 1967 (Minutes, pp. 2-5). On April 29, 1967, the jury returned guilty verdicts on seven of the twelve counts of the complaint. These involved paperback books entitled "Blood Orgy" (Count One); "His Brother Love" (Count Four); "Pay the Devil" (Count Eight); "The Flesh Worshipers" (Count Nine); "Never on Sin Day" (Count Fourteen); "Gay Reunion" (Count Fifteen); and "That Kind of Girl" (Count Sixteen). The jury returned not guilty verdicts on the following materials: a film entitled "New and Better Strips" (Count Two); another untitled film (Count Three); a book entitled "Lesbian Love Play" (Count Six); a book entitled "Sexperiment" (Count Seven); a set of twelve photographs of a Negro woman (Count Ten); a set of twelve photographs of two Caucasian women (Count Eleven); and a book entitled "The French Way" (Count Twelve). The jury was unable to reach a verdict as to Counts Five and Thirteen and a mistrial was declared as to them (Minutes, pp. 16-17).

Following numerous post-trial motions (Minutes, pp. 17-18), petitioner was placed on probation for a period of three years on the conditions (among others) that he serve one year in the county jail and pay a fine of $1,000 (Minutes, p. 19). An appeal was taken to the Appellate Department of the Superior Court (Minutes, p. 20). That court affirmed on June 26, 1968. (Appendix A to Petition).

During the trial, investigators for the Santa Clara County District Attorney's office testified that they visited petitioner's book store and purchased the materials which were the subject matter of the convictions. They testified that they saw a sign reading "No Minors" but at no time during their five visits did they see an exterior sign reading "Adults Only." Petitioner testified that various signs limiting patronage to adults were posted both inside and out-

side of the store. He testified that the rule against the presence of minors was enforced. There was no evidence of minors being involved in the case. Nor was there any evidence indicating sale of materials to sexual deviants. Photographs of the front of petitioner's store were taken the day after his arrest and introduced as People's Exhibit 3. (Settled Statement on Appeal, p. 3).

The prosecution witnesses testified that the walls of the store were covered with display racks containing nudist magazines showing exposed male and female genitalia and other pictures of nude and semi-nude males and females. Other shelves and racks contained sex-oriented paperbacks. A glass showcase case contained film, some boxes of which had still photos of semi-nude females in provocative poses pasted on the outside. The investigators testified that they saw no matter dealing with subjects other than sex and nudity. However, petitioner testified that he had some dictionaries and "Westerns" for sale in addition to the above described materials. He also testified that nothing was kept "under the counter," and that all merchandise was in full view. (Settled Statement on Appeal, p. 4).

The prosecution called Dr. John Peschau, a psychiatrist experienced in diagnosing and treating sexual deviants who was employed by a state hospital. During his testimony he defined such terms as "sadism," "masochism," "male and female homosexuality," and others. He was shown the covers of several of the books involved in this case which contained deviant descriptions and stories. Hypothetical questions reflecting the contents of the books in issue were asked of Dr. Peschau. He also testified to the effect of the covers alone on the "prurient interest of a deviant." (Settled Statement on Appeal, pp. 3-4).

A tape recording of an interview of petitioner by District Attorney's Investigator Douglas Logan and San Jose

Police Sergeant Ralph Brune was admitted in evidence as People's Exhibit 2. (Minutes, p. 6; Settled Statement on Appeal, pp. 4-5). That tape recording reflects that on March 14, 1966, petitioner was advised by these officers that in their opinion he had materials in his store which were pornographic and obscene. They advised him that if he continued to sell such materials he did so at his own risk. Petitioner responded, "If you show me it, I'll remove it from the shelf." The officers emphasized that they were not present to act as censors. They did not specifically advise him that any particular materials were obscene. Petitioner went on to explain that he remained "three to six months behind any other of this type of business—because I don't want to break no ice—I just want stuff that is legal. . . ." Petitioner persisted in asking the officers to point out items which they believed were obscene. Mr. Logan again stated that they did not intend to act as censors. He advised petitioner that he should be able to judge the materials himself. Petitioner responded by stating, "That's what I've been working on—on that theory." He related how he had asked customers for their definitions of obscene and that he had obtained a variety of answers. Then he went on to state, "So I put it this way—any human contact, this goes whether it's between male to male or male to female—definitely, to me, is pornography and obscene. I won't have none of that. When I say—human contact—I mean sexual contact." (People's Exhibit 2).

Petitioner went on to state that he carried "nudie" and "girlie" magazines and books in his store. He stated that he had a limited number of films. With respect to films, he indicated that he "keeps it down—to make sure." After explaining about these items of his stock, he went on to state, "I am operating on spicy literature because I think that is what the man is for—spicy literature. They want

something that is, you know, in the spicy line, dealing in sex. I believe that much." (People's Exhibit 2).

At the conclusion of the interview, District Attorney's Investigator Logan advised petitioner that any contacts he had had with the district attorney's office or the police department should not be construed as an endorsement of any of the materials which he purveyed. (People's Exhibit 2).

Petitioner offered two books into evidence, "My Secret Life" and "The Story of O," to establish contemporary community standards. The trial judge ruled that the book "My Secret Life" was not comparable to any of the materials in evidence and refused its admission. The book "The Story of O" was ruled comparable but no satisfactory evidence was elicited from petitioner's expert witness, a Mr. Lilienthal, that the book had gained acceptance by the community as a whole. (Settled Statement on Appeal, p. 4).

The trial judge instructed the jury on the issue of "scienter," that it was only necessary for the prosecution to establish that petitioner was "aware of the contents of the materials" and that it was "not necessary to show that he knew it was obscene." They were further instructed that if petitioner was found to have knowledge of the contents of the materials, "then he had knowledge within the meaning of the law no matter what he may have thought concerning the alleged obscenity of the materials." (Settled Statement on Appeal, p. 2).

I. The Paperback Books Which Are the Subject Matter of Petitioner's Convictions Are Obscene.

The thrust of petitioner's case for granting certiorari is that the books purchased in his store are comparable to, if not indistinguishable from, many of the writings to which this Court recently accorded constitutional protection

(Pet. pp. 18-21).[3] We are not in a position to compare and contrast the sordid publications in this case with those involved in the cases upon which petitioner relies. Even if this were feasible, we doubt whether such efforts would be especially helpful. It would appear to be a futile exercise in sophistry for we do not know with any certainty what the precise basis for these decisions was since the Court chose to deal with them by per curiam decisions. This recent obscenity *vel non* approach precludes meaningful analysis. The Court's citation in each case (except *Corinth Publications*) to *Redrup v. New York,* 386, U.S. 767 (1967), is, of course, not particularly instructive since that case too was decided in a cryptic manner. As Mr. Justice Harlan has observed, ". . . no stable approach to the obscenity problem has yet been devised by [the] Court." *Memoirs v. Massachusetts,* 383 U.S. 413, 455 (1966) (dissenting opinion). More recently, he aptly described our predicament as one of "utter bewilderment." *Ginsberg v. New York,* 390 U.S. 629, 707 (1968) (concurring opinion); *Interstate Circuit v. Dallas,* 390 U.S. 676, 707 (dissenting opinion).

But despite the reference in *Redrup* to the divergent views of individual members of the Court and the opinion's omnibus conclusion that: "Whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand." 386 U.S. at 771, we must assume that the three element formula first announced in *Roth v. United States,* 354 U.S. 476 (1957), still has vitality. Since the three elements must "coalesce,"

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3. The cases relied upon are: *Aday v. United States,* 388 U.S. 447 (1967); *Books Inc. v. United States,* 388 U.S. 449 (1967); *A Quantity of Books v. Kansas,* 388 U.S. 452 (1967); *Corinth Publications, Inc. v. Wesberry,* 388 U.S. 448 (1967); *Keney v. New York,* 388 U.S. 440 (1967); *Friedman v. New York,* 388 U.S. 441 (1967); *Mazes v. Ohio,* 388 U.S. 453 (1967); *Shepard v. New York,* 388 U.S. 444 (1967); *Avansino v. New York,* 388 U.S. 446 (1967).

Memoirs v. Massachusetts, supra, 383 U.S. 413, 418 (1966), if any one element is missing a finding of obscenity cannot be sustained. We have then, assumed that the decisions upon which petitioner relies are based upon the belief of at least a plurality of the members of the Court that, in spite of the books' preoccupation with sexual description, they somehow possessed redeeming social value or lacked patent offensiveness. We approach this case upon the assumption that the three element test will be the relevant constitutional criterion under which the materials here involved will be judged.

This Court is the final arbiter of the question of whether materials are obscene and beyond the mantle of First Amendment protection and must itself review the books in issue. *Jacobellis v. Ohio,* 378 U.S. 184, 188 (1963); *Manual Enterprises v. Day,* 370 U.S. 475, 488 (1961); *Roth v. United States, supra,* 354 U.S. 476, 497-98 (1957) (Concurring opinion). Thus, a detailed review of them appears unnecessary. However, petitioner depicts these books as ones which readily meet contemporary community standards of candor in the representation of sexual matters and which also constitute literary efforts of substantial merit (Pet. pp. 13-18). Indeed, petitioner's summation of the books makes us wonder whether we are talking about the same publications. For as we read them, they are worthy of none of the glowing comments attributed to them. Thus, while the Court itself must review and assess these turgidly sexual tracts, we nevertheless submit our comments concerning their contents.

"Blood Orgy" (Count One; People's Exhibit 12), deals with the sexual adventures of two middle-class American families and other secondary characters. Characterization in this tale is weak and unreal. The plot is a grossly detailed account of unusual sexual practices thinly held together by

arbitrary events which thrust the characters from one sexual episode to the next. Its theme must be said to be exclusively sexual. It contains graphic descriptions of female oral copulation on female, female on male, etc. and concludes with an act of sadistic torture, patricide and sodomy by a son on his father's corpse. The suggestion by petitioner that "[t]he book directs attention to the dangers of the development of a cruel and violent personality and the need to prevent such development by adult example" (Pet. p. 14), falls woefully short of being a satisfactory justification for the book's blatantly dominant theme of the description of perversity.

The book "His Brother's Love" (Count Four; People's Exhibit Four) deals with sexual encounters of various heterosexual and homosexual characters. These encounters are detailed against the background of a dress business in a big city. It describes the struggles of a homosexual girl designer and a "normal" girl designer for the sexual affections of a third party, a male business consultant who is apparently "bisexual." The sexual acts described in the story are minutely detailed. A typical sex act requires eight or nine pages of descriptive and clinical writing. The author places his characters into situations where they may observe the sexual activities of others from hidden vantage points. Thus, for example, in Chapter XIII one man watches three others writhe about in homosexual intercourse. The book's predominant theme of the description of various forms of sex acts dealt with in erotic detail is plainly visible through the thin veil of an inane plot. In any traditional literary sense, the book cannot be said to have meaning or worth.

Count Eight of the complaint concerns the book "Pay the Devil" (People's Exhibit 9). It purports to deal with the rise and fall of one Matt Colby, a young man who is

first encountered as he engages in oral copulation with a young lady in the rear of a grocery store. Colby's sexual exploits (which constitute 126 of the book's 159 pages) involve activities such as oral copulation, sodomy, sadistic love making, voyeurism and sadism. Plotwise, the book is a sexual fantasy intertwined with meaningless encounters and incidents which first ally Colby with gangsters and then separate him from the world by murder at their hands. The plot, if such it can be called, is visibly contrived. More aptly, it could be described as a sequence of events rather than a plot. The characters in the story lack authenticity and must be considered to have been created by a distorted mind.

The book, "The Flesh Worshipers," by Jack Weeds (Count Nine; People's Exhibit 7), centers on the sexual activities of a group of people who survive an airplane crash in the jungle. The book itself states that it is "unbelievably depraved." It is also unbelievably stilted and unreal in its characterization. The plot is absurd and the descriptions gross. By Chapter II the book has progressed from male-female sex acts to oral copulation. By Chapter IV it describes the Reverend Elder Pepperdine performing perversely with an artificial device and two young women. A man is sodomized by a wooden phallus in the hands of women. It concludes its fantastic description of sexual exploits by a mass "daisy chain" orgy and murder. In petitioner's view, "The book exemplifies the dangers which good people may encounter when they lose self control, willingly or unwillingly, over their lives and actions and fail to canalize and maintain a balance between their basic instincts and the demands of an ordered society." (Pet. pp. 15-16). Petitioner must surely be given credit for this imaginative assessment. But it would seem exceedingly remote that anyone reading this volume would find such an altruistic message.

The book purportedly written by a Peter Dunning entitled "Never on Sin Day" (Count Fourteen; People's Exhibit 16) again deals exclusively with sexual activity. A young man from Iowa moves to Los Angeles to study animal husbandry. Homosexual acts pervade the book to the exclusion of any rational content. It requires two-thirds of its length to get its leading male character to bed with a female. Occasionally, the text deals in matters such as the content of a nude male art magazine. It features such activities as a homosexual pet party and a nude orgy. But, its sexual preoccupation completely overshadows a fragmentary and absurd plot. If it has a theme at all it can only be said to be sexual description. Technically speaking, the book may be described as an irreparable disaster.

There is no real beginning to the book "Gay Reunion" (Count Fifteen; People's Exhibit 19). The opening twelve pages consist of a sexual fantasy by a female named Charlotte Charming. Dreams play an essential part in the fabrication of this story as the principal character always dreams a sex fantasy before experiencing it in vivid, graphic fact. The plot of the book is a sexual production line that passes the characters along from one erotic encounter to another. The final page of the story contains a line which is a magnificent understatement: "A fantastic story, perhaps even unbelievable." Moreover, the book is barely readable.

The final book, "That Kind of Girl," (Count Sixteen; People's Exhibit 17), deals with lesbianism, orgiastic activities and occasional heterosexual encounters. The plot tries to develop from a blackmail situation in which one of the principal female characters is threatened by the disclosure of certain lewd photographs of her engaged in lesbian activities. Sex is the theme here, and no detail is too graphic. Oral sex acts by lesbians are dealt with minutely. The book only gives the outward appearance of a novel. If

sexual description were eliminated, the book would disappear.

In evaluating these publications, we ask the Court to bear in mind that there seems little doubt that if the contents of these books were transformed into the medium of a motion picture, there would be no doubt as to their obscene character. We submit that there should be no significant constitutional difference between the media chosen by purveyors of smut. But see, *Landau v. Fording,* 245 Cal.App.2d 820, 827, 54 Cal.Rptr. 177, 181 (1966), *aff'd,* 388 U.S. 456 (1967). These books, which verbally describe perverted and bizarre sex acts in near clinical detail, are no less offensive to contemporary community standards relating to the description or representation of sexual matters than is a motion picture film which graphically portrays such conduct. Likewise, the appeal to prurient interest is the same. We submit that they are manifestly obscene. They possess no recognizable trace of redeeming social value. That social value which has been attributed to them by petitioner is ingeniously contrived and artificial. In short, they should not be accorded constitutional protection. On this ground, certiorari should be denied.

II. A Proper Standard of "Scienter" Was Applied in This Case and the Evidence of Petitioner's Knowledge of the Contents of the Obscene Books Is Constitutionally Sufficient.

Petitioner's second ground of constitutional challenge to his convictions is that, "The record is barren of any evidence to establish that petitioner knew the contents of the books or that the contents were obscene. . . ." Pet., p. 25. We submit that this claim likewise does not warrant granting certiorari. The instructions to the jury were in accord with this Court's decisions and there is ample evidence in the record of petitioner's "scienter" which satisfies the

constitutional criteria so far established by this Court. At this juncture then, we do not treat this perplexing issue in depth for we submit that this case affords no occasion for reexamination or refinement of the "scienter" requirements. *Cf., Ginsberg v. New York, supra,* 390 U.S. 629, 643-45 (1968).

California Penal Code section 311.2, under which petitioner's convictions were obtained, makes it a crime to "knowingly . . . distribute obscene matter." The word "knowingly" is defined in subdivision (e) of Penal Code section 311. " 'Knowingly' means having knowledge that the matter is obscene." This statutory definition has been amplified by judicial interpretation.

In *People v. Campise,* 242 Cal.App.2d Supp. 905, 51 Cal. Rptr. 815 (1966), *overruled on other grounds, Flack v. Municipal Court,* 66 Cal.2d 981, 992, n. 12, 59 Cal.Rptr. 872, 429 P.2d 192 (1967), the court declared that:

> ". . . a reasonable construction of Penal Code, section 311, subdivision (e) is as follows: The defendant must have known the contents of the material, and must have been in some manner aware of its obscene character.
>
> "In short, it is not necessary to construe 'knowledge that the matter is obscene' as meaning 'knowledge that a court would decide the matter to be obscene.' " 242 Cal.App.2d Supp. at 915, 51 Cal.Rptr. at 821-22.

Similarly, in *People v. Pinkus,* 256 Cal. App. 2d Supp. 941, 63 Cal.Rptr. 680 (1967), the court stated:

> "To construe the code language to mean that an accused must know that the matter will actually be held constitutionally obscene by the highest court of the land is not a workable standard. Such a construction of Penal Code, section 311, subdivision (e) would altogether stultify obscenity prosecutions.
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> • • • • • • •
>
> "We cannot impute to the Legislature an intent to employ the words 'knowledge that the material is

obscene' in a sense that would render prosecutions under Penal Code, section 311.2 an impossibility. Awareness of the contents of a matter and that it is of obscene character or nature was all that was intended and all that is constitutionally required." 256 Cal.App. 2d Supp. at 949-950, 63 Cal.Rptr. at 685-86. *See also, People v. Harris,* 192 Cal.App.2d Supp. 887, 13 Cal. Rptr. 642 (1961), *rev'd sub. nom. on other grounds, In re Harris,* 56 Cal.2d 879, 16 Cal.Rptr. 889, 366 P.2d 305 (1961), *vacated on other grounds,* 374 U.S. 499 (1963); *People v. Williamson,* 207 Cal.App.2d 839, 845-46, *hrng. den.* (1962), *cert. den.* 377 U.S. 994 (1964), *overruled on other grounds, In re Giannini and Iser, supra,* 69 A.C. 588, 602, 72 Cal.Rptr. 665, 446 P.2d 535, 545 (1968).

These interpretations[4] comport with this Court's holdings which have outlined the minimal requirements for proof of "scienter" in the First Amendment context. In *Smith v. California,* 361 U.S. 147 (1959), Mr. Justice Brennan's opinion for the Court stated:

"We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a book seller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a book seller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. Doubtless any form of criminal obscenity statute appli-

4. Petitioner relies upon a statement of the interpretation of the statutory definition of "knowledge" contained in a report submitted by this office to the California Legislature (Pet. p. 5, n. 2). Report to the California Legislature on Obscentity: The Law and the Nature of the Business (April 6, 1967). As the cases in the preceding text plainly demonstrate, the incidental statement to which petitioner refers was in error or, at least, a gross oversimplification.

> cable to a bookseller will induce some tendency to self-censorship and have some inhibiting effect on the dissemination of material not obscene, but we consider today only one which goes to the extent of eliminating all mental elements from the crime." *Id.* at 154-55.

The separate opinions of justices other than those joining in the majority opinion in *Smith* lend further meaning to this discussion. Mr. Justice Black concurred in the decision overturning the Los Angeles Municipal Ordinance but in so doing specifically disapproved the Court's treatment of the scienter issue. As he read the majority opinion, the scienter requirement needed little by way of proof. The character of proof was also indicated. "The Court's opinion correctly points out how little extra burden will be imposed on prosecutors by requiring proof that a book seller was *aware of a book's contents* when he possessed it." [Emphasis added.] 361 U.S. at 156 (concurring opinion).

Mr. Justice Frankfurter's concurring opinion in *Smith* likewise sheds light on the scope of the majority opinion. He stated:

> "Obviously the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop. No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut.
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> * * * * * * *
>
> [T]he proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity. Out of regard for the State's interest, the Court suggests an unguiding, vague standard for establishing 'awareness' by the bookseller of the contents of a challenged book in contradiction of his disclaimer of knowledge of its contents. A bookseller may, of course, be well aware of the nature

> of a book and its appeal without having opened its cover, or, in any true sense, having knowledge of the book. As a practical matter therefore the exercise of the constitutional right of a State to regulate obscenity will carry with it some hazard to the dissemination by a bookseller of non-obscene literature. Such difficulties or hazards are inherent in many domains of the law for the simple reason that law cannot avail itself of factors ascertained quantitatively or even wholly impersonally." 361 U.S. at 161, 164 (concurring opinion).

In *Mishkin v. New York, supra,* 383 U.S. 502, 510 (1966), Mr. Justice Brennan again spoke for the Court on this issue. In reviewing a New York conviction under a criminal obscenity statute, the Court approved of the New York Court of Appeals interpretation of that state's statute. The statute was interpreted as meaning "that only those who are *in some manner aware of the character of the material they attempt to distribute* should be punished. It is not innocent but calculated purveyance of filth which is exorcised...." *People v. Finkelstein,* 9 N.Y.2d 342, 344-45, 174 N.E.2d 470, 471 (1961). (Emphasis added).

And, last term in *Ginsberg v. New York, supra,* 390 U.S. 629 (1968), the *Finkelstein* definition was again approved. It was said:

> "When [the statute prohibiting sale of obscene material to minors] was before the New York Legislature its attention was directed to *People v. Finkelstein,* as defining the nature of *scienter* required to sustain the statute [citation omitted]. We may infer that the reference in [the statute] to knowledge of 'the *character* and content of any material described herein' incorporates the gloss given the term 'character' in *People v. Finkelstein.* In that circumstance *Mishkin* requires rejection of appellant's challenge...." *Id.* at 644.

This Court concluded in *Mishkin* that, "The New York definition of ... scienter ... fully meets the demands of the Constitution." 383 U.S. at 511 (footnote omitted). We submit that California's definition of scienter is no less demanding and that the instructions given the jury in this case fully met the constitutional requirements. The trial judge instructed the jury that the scienter element would be satisfied if it were established beyond a reasonable doubt that petitioner was aware of "the contents of the materials." That instruction, we submit, satisfies the criteria of *Smith, Mishkin,* and *Ginsberg.*

Petitioner's challenge to the sufficiency of the evidence of "scienter" fails to present a federal constitutional question. Given the premises that the jury was properly instructed and that there was some evidence in the record to support the finding implicit in the verdicts that petitioner was aware of the contents of the books, a challenge to the quantum of evidence does not give rise to an issue of due process. *Phelper v. Decker, supra,* 401 F.2d 232, 238-39 (5th Cir. 1968). It is only where the prosecution introduces no evidence to establish any elements of any offense that due process is denied. *Garner v. State of Louisiana,* 369 U.S. 157 (1961); *Thompson v. City of Louisville,* 362 U.S. 199 (1960); *cf. Jacobellis v. Ohio, Supra,* 378 U.S. 184, 202 (1964) (Warren, C. J., dissenting).

In any event, there was plainly ample evidence of petitioner's knowledge concerning the contents of the books. The tape recording (People's Exhibit 2) of the conversation between petitioner and the two investigating officers discloses beyond peradventure that petitioner knew of the contents of the books he was selling. When it was suggested that he was old enough to judge his wares by himself, he answered, "That's what I've been working on—on that theory." Petitioner also expressed his own view of what

constituted obscenity. "So I put it this way—any human contact, this goes whether its between male to male or male to female, definitely to me is pornography and obscene. I won't have none of that. When I say human contact, I mean sexual contact." He further indicated that obscenity "is to the point where there is lewd suggestive motion." He indicated that he "stayed three to six months behind other stores" so that if any obscene matter were being sold it would be caught before he brought it into his store. He said, "I don't want to break no ice." Finally, petitioner described the kinds of materials he maintained in his store including the "nudie" and "girlie" books as well as the films and photographs. He explained how he kept everything out of sight from the outside of his store especially so that children who might be walking by would not see anything. With respect to the books, he stated significantly, "I am operating on spicy literature because I think that that's what the man is for—spicy literature—they want something that is, you know, in the spicy line, dealing in sex. I believe that much." (People's Exhibit 2). We submit that this evidence and the inferences properly drawn therefrom is constitutionally sufficient to support the finding of "scienter" in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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